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Office of Disciplinary Counsel

FILED

APR 05 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0688

IN RE THE PETITION AND
MEMORANDUM IN SUPPORT OF
REVISION OF RULES OF PROFESSIONAL
CONDUCT ON ADVERTISING

ODC'S COMMENTS

The Office of Disciplinary Counsel ("ODC") offers the following comments
on the proposed amendments to Rules 8.5 and 7.1, MRPC.

Proposed Amendment to Rule 8.5

Rule 8.5 pertains to disciplinary jurisdiction of the Court.¹ The proposed
amendment seeks to extend disciplinary authority of the Court to any lawyer not

¹ Rule 7, RLDE (2002) also pertains to the Court's disciplinary jurisdiction.

1 admitted in Montana who “advertises, solicits or offers legal services in this State.”

2 ODC opposes this proposed amendment for the following reasons.

3 On its face, the proposed amendment extends disciplinary jurisdiction over
4 any lawyer whose broadcast, print, or Internet (including websites²) advertisement
5 reaches Montana. Thus the Court’s disciplinary authority, potentially, would be
6 expanded to include hundreds of thousands of lawyers. This raises the following
7 questions.
8

- 9 • Will all out-of-state lawyers be subject to discipline in Montana if
10 their advertisement reaches Montana and fails to comply with
11 Montana’s advertising rules?³
12
- 13 • Will Rule 8.5, if amended, be interpreted to just apply to out-of-state
14 advertisements that specifically target Montana? If so, what criteria
15 will be used to determine whether an advertisement targets Montana?
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- 17 • How will the Court discipline out-of-state lawyers who have not been
18 admitted to Montana and who have no desire to practice in Montana?
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20 Also, there are due process considerations when a State seeks to impose
21 personal jurisdiction over persons whose communications happen to reach the
22

23 ² “Law firm Web sites constitute a form of lawyer advertising and must conform to the requirements governing
24 other methods of advertising legal services, which are set forth in Rules 7.1 through 7.5 of the ABA Model Rules of
Professional Conduct.” ABA/BNA Lawyers’ Manual on Professional Conduct (Practice Guides), § 81:551.

25 ³ Actually, under the proposed amendment, any out-of-state lawyer whose advertisement reaches Montana could be
disciplined for failure to comply with any of Montana’s Rules of Professional Conduct.

1 State. The mere act of placing information on the Internet is not sufficient by itself
2 to subject a person to personal jurisdiction in each State in which the information is
3 accessed. Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002);
4 Snowney v. Harrah's Entertainment, Inc., 35 Cal. 4th 1054, 1063, 112 P.3d 28, 33
5 (2005).
6

7 In addition, it is questionable whether ODC has the resources to effectively
8 investigate and prosecute out-of-state lawyers whose advertisements reach the
9 State of Montana and allegedly run afoul of Montana's advertising rules.
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11 The proposed changes to Rule 7.1 are taken, to large extent, from Missouri's
12 Rule 4-7.1. Missouri has adopted Model Rule 8.5 (Disciplinary Authority; Choice
13 of Law). Montana's Rule 8.5 substantially differs from Model Rule 8.5.
14 Following Model Rule 8.5, Missouri's Rule 4-8.5 states, in part:
15

16 (b) In any exercise of the disciplinary authority of this
17 jurisdiction, the rules of professional conduct to be
18 applied shall be as follows:

19 (1) for conduct in connection with a matter pending
20 before a tribunal, the rules of the jurisdiction in which the
21 tribunal sits, unless the rules of the tribunal provide
22 otherwise; and

23 (2) for any other conduct, the rules of the jurisdiction in
24 which the lawyer's conduct occurred, or, if the
25 predominant effect of the conduct is in a different
jurisdiction, the rules of that jurisdiction shall be applied
to the conduct.

A lawyer shall not be subject to discipline if the lawyer's
conduct conforms to the rules of a jurisdiction in which

1 the lawyer reasonably believes the predominant effect of
2 the lawyer's conduct will occur.

3 Therefore, a lawyer is not subject to discipline in Missouri for failure to
4 comply with Missouri's advertising rules "if the lawyer's conduct conforms to the
5 rules of a jurisdiction in which the lawyer reasonably believes the predominant
6 effect of the lawyer's conduct will occur." Montana's Rule 8.5 has no such
7 limitation.

8 Hence, it appears that ODC would be obligated to investigate and prosecute
9 out-of-state lawyers for failure to comply with Montana's rules even if those
10 lawyers have complied with their own State's rules.

12 As a practical matter, ODC may not, given its caseload and small staff, have
13 the resources to properly handle complaints against out-of-state lawyers who have
14 advertisements that happen to reach Montana and do not comply with Montana's
15 rules. One can envision a complaint by a Montana lawyer who views an
16 advertisement on cable television that supposedly does not comply with Montana's
17 rules. ODC would have to try to find the advertisement, determine how, when and
18 where it was broadcast in Montana, obtain a copy and view the advertisement,
19 locate the lawyer who paid for the advertisement, determine whether the
20 advertisement complied with Montana's rules and, if it does not, attempt to bring
21 disciplinary proceedings against the lawyer.
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1 In view of the foregoing, ODC does not recommend adoption of the
2 proposed amendment to Rule 8.5.

3 *Proposed Amendment to Rule 7.1*

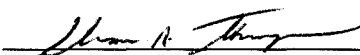
4 ODC does not take a position as to whether the Court should adopt the
5 proposed changes to Rule 7.1. That said, ODC would like to make the following
6 point. The current language of Montana's Rule 7.1 is the same as ABA Model
7 Rule 7.1. ODC submits that the Court should be leery about deviating from the
8 Model Rules of Professional Conduct. Since most jurisdictions have adopted, to a
9 large extent, the Model Rules, a collective body of law has developed that helps in
10 interpreting the rules. To the extent that Montana's rules do not follow the Model
11 Rules, there are fewer cases that are useful in interpreting the rules.
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14 Also, in 2009 the ABA created the ABA Commission on Ethics 20/20. The
15 mission of the Commission, according to its website, is to "perform a thorough
16 review of the ABA Model Rules of Professional Conduct and the U.S. system of
17 lawyer regulation in the context of advances in technology and global legal
18 practice developments." The work of the Commission is expected to last three
19 years. It is possible the concerns that led to the petition before the Court will be
20 studied and addressed by amendments to the Model Rules. Legal marketing
21 (including possible amendments to Rules 7.1 and 8.5) appears to be an issue to be
22 considered by the Commission.
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1 See <http://www.abanet.org/ethics2020/comments.html> and the link to the
2 Legal Marketing Association.

3 Therefore, the Court may wish to consider postponing any amendment to
4 Rule 7.1 until the Commission completes its study.

5 RESPECTFULLY SUBMITTED this 2nd day of April, 2010.
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10 Shaun R. Thompson
11 Disciplinary Counsel
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